

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
425 FIFTH AVENUE NORTH
NASHVILLE, TENNESSEE 37243

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Opinion No. 04-003

Regulation of Fishing Activities on Interstate Waters Bordering Tennessee

QUESTION

Does the Tennessee Wildlife Resources Agency have the authority to regulate the possession of fish caught in interstate waters bordering Tennessee, when the fish are caught by Tennessee residents using nonresident licenses from an adjacent state and then are transported back to the Tennessee side of the river?

OPINION

Yes. It is the opinion of this Office that the Tennessee Wildlife Resources Agency is authorized to enforce wildlife statutes and proclamations regulating the supply of fish in interstate waters against Tennessee residents using valid nonresident fishing licenses, as long as Tennessee has a compact providing for concurrent criminal jurisdiction over such waters with the adjacent state in question.

ANALYSIS

This inquiry focuses on Tennessee's wildlife regulations and proclamations, which make it illegal to catch more than one catfish over thirty-four inches in length from the Mississippi River. It is our understanding that the State of Arkansas has no such prohibition and that it has, therefore, become the custom of some Tennesseans to obtain nonresident fishing licenses from Arkansas in order to take advantage of that state's more lenient fishing regulations pertaining to the Mississippi River.

Tennessee's hunting and fishing statutes were originally enacted by the legislature in 1951, and they begin with the axiom that ownership and title to wildlife is vested in the State. Tenn. Code Ann. § 70-4-101(a) provides as follows:

The ownership and title to all forms of wildlife within the jurisdiction of the state, as are not individual property under the laws of the land, are hereby declared to be in the state. *No wildlife shall be taken or killed in any manner or at any time except the person or persons so taking or killing the wildlife*

shall consent that the title thereto shall be and remain in the state for the possession, use and transportation thereof after such taking or killing as set forth in this chapter.

(Emphasis supplied). The Tennessee Supreme Court has acknowledged this notion that title to wildlife vests in the State, even in the absence of a statutory provision, finding “it to be well settled in at least American jurisprudence that, without the aid of a statute, and as part of the common law of this country, the title of game animals, birds, and fish is in the State as trustee for the benefit of its citizens.” *Acklen v. Thompson*, 122 Tenn. 43, 51, 126 S.W. 730 (1909); *accord Key v. State*, 215 Tenn. 136, 142, 384 S.W.2d 22, 24 (1964).

As the sole trustee of wildlife within its borders, the State also has the sole authority to regulate the protection and preservation of that wildlife. Article XI, § 13 of the Tennessee constitution provides as follows:

The General Assembly shall have the power to enact laws for the protection and preservation of Game and Fish, within the State, and such laws may be enacted for and applied and enforced in particular Counties or geographical districts, designated by the General Assembly.

In accordance with this constitutional directive, our courts have long recognized that “the power of the Legislature to enact laws for the protection and preservation of game in the forest, and fish in the waters of the State, has been so frequently exercised, and . . . has been so uniformly maintained, that the question has now passed beyond the realm of debate.” *Peters v. State*, 96 Tenn. 682, 688-89, 36 S.W. 399 (1896) (citations omitted); *accord, Bluff City Fish Co. v. Tennessee Fish and Game Comm’n*, 220 Tenn. 242, 244, 415 S.W.2d 877, 878 (1967).

Tenn. Code Ann. § 70-4-102 makes it illegal to take or possess any form of wildlife, except as permitted under the provisions of the wildlife statutes. It also provides that violations of the proclamations and rules of the Tennessee Wildlife Resources Commission (TWRC) are punishable as a crime (Class B misdemeanor). Tenn. Code Ann. § 70-4-107 specifically governs hunting and fishing seasons and bag and creel limits, and it authorizes the TWRC to issue proclamations and rules for that purpose. This latter statute is clearly concerned with regulating the *supply* of game and fish generally for hunting and/or taking. In particular, Tenn. Code Ann. § 70-4-107(b) states:

Whenever the supply of game and/or fish existing in any area, lake or stream shall become adequate to allow the taking and/or hunting thereof without material danger of extinction or undue depletion of such game or fish, then it is lawful for any person to hunt and/or fish in the area, lake or stream within the creel,

size, and bag limits, and in the manner and by the means prescribed by the wildlife resources commission.

Having addressed the State's ability to regulate the taking and possession of wildlife within its borders, we must also consider the issue of the State's jurisdiction over the taking of fish inhabiting interstate waters. Your inquiry specifically concerns the taking of fish with a valid nonresident license from an adjacent state, which has no size or creel limits on the species in question.

We believe that the Tennessee Supreme Court spoke on a somewhat similar issue in *Couch v. State*, 203 S.W. 831 (Tenn.1918). There, the court addressed the criminal liability of a steamboat captain, on whose vessel the sale of liquor occurred at a point west of the center of the main channel of the Mississippi River. At that time, Tennessee had a law criminalizing the sale of intoxicating liquors within four miles of a school house. The Supreme Court upheld the captain's conviction, after noting, first, that the States of Tennessee and Arkansas had entered into a compact, under the consent of Congress in 1909, to resolve what jurisdiction should be exercised by those states over offenses occurring upon the Mississippi River. *Id.* at 832-833. Shortly thereafter, Arkansas passed a law recognizing concurrent jurisdiction in Arkansas and Tennessee over the whole of the waters of the Mississippi between the two states. In 1915, the Tennessee Legislature enacted a similar law, Public Chapter 123 of the Acts of 1915, extending this state's criminal jurisdiction to the west bank of the Mississippi River. *Id.*

In light of the *Couch* decision and the fact that a violation of any of Tennessee's wildlife proclamations constitutes a criminal offense under Tenn. Code Ann. § 70-4-102, we believe that Tennessee's wildlife agency has the authority to enforce its laws relating to the taking and possession of fish in the Mississippi River against Tennessee residents, regardless of whatever nonresident licenses Tennessee fishermen may hold. We note that your inquiry reflects that this situation may not be limited to the Mississippi River, since Tennessee also shares waters with other states (Kentucky, Alabama, and Mississippi particularly). Since the District Attorneys General are vested with the authority to enforce the criminal statutes concerning the taking and possession of wildlife, it may be more appropriate to consult the officials in the relevant districts to determine whether Tennessee has a compact providing for concurrent criminal jurisdiction with those states.

PAUL G. SUMMERS
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

ELIZABETH P. McCARTER
Senior Counsel

Requested by:

William Cox
Commissioner
Tennessee Wildlife Resources Commission
P.O. Box 40747
Nashville, TN 37204